

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

MAY - 3 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Appropriate Framework for Broadband)	CC Docket No. 02-33
Access to the Internet over Wireline Facilities)	
)	
Universal Service Obligations of Broadband)	
Providers)	
)	
Computer III Further Remand Proceedings:)	CC Docket Nos. 95-20, 98-10
Bell Operating Company Provision of)	
Enhanced Services; 1998 Biennial Regulatory)	
Review - Review of Computer III and ONA)	
Safeguards and Requirements)	

TO: The Commission

COMMENTS OF THE WESTERN ALLIANCE

The Western Alliance hereby comments in response to the Commission's Notice of Proposed Rulemaking, FCC 02-42, released February 15, 2002 ("NRPM"), which appeared in the Federal Register, 67 FR 9232, on February 28, 2002.

The primary concern of the Western Alliance is that rural telephone companies retain the ability to provide "broadband" facilities and services¹ to their rural customers at affordable rates. Between 1999 and 2001, the percentage of National Exchange Carrier Association ("NECA") pool members offering digital subscriber line ("DSL") and other advanced telecommunications services increased from 14 percent to more than 50 percent.² However, this recent progress in rural broadband implementation will end if the

¹ By "broadband" facilities and services, the Western Alliance means "high speed services" (200 kbps or greater in at least one direction) and ultimately "advanced telecommunications capability" (more than 200 kbps in both directions).

² Compare: National Exchange Carrier Association, Paving the Digital Highway (2001) with National Exchange Carrier Association, Keeping America Connected: The Broadband Challenge (1999).

proposed classification of broadband Internet access services as Title I "information services" forces rural telephone companies to recover a substantial portion of their broadband costs entirely from their customers. During the foreseeable future, NECA pooling and other aspects of Title II rate regulation are necessary to maintain rates for rural broadband services at affordable levels.

The Western Alliance

The Western Alliance is a consortium of the Western Rural Telephone Association and the Rocky Mountain Telecommunications Association. It represents about 250 rural telephone companies operating west of the Mississippi River.

Western Alliance members are generally small local exchange carriers serving sparsely populated rural areas. Most members serve less than 3,000 access lines overall, and less than 500 access lines per exchange. Most members generate revenues much smaller than the national telephone industry average, and rely upon interstate access and universal service dollars for 45-to-70 percent of their revenue base.

Western Alliance members incur per-customer facilities and operating costs far in excess of the national average to serve areas that include sparsely populated farming and ranching regions, isolated mountain and desert communities, and Native American reservations. Their small size precludes realization of significant economies of scale with respect to their loop, switching, operating or administrative costs. The remote and sparsely populated nature of their service areas means that their loops are much longer than the national telephone industry average (often extending 25-to-50 miles from the switch), and that their costs per loop far exceed those of urban and suburban carriers.

Data transmission is particularly difficult when routed through the repeaters, load coils, line concentrators, digital loop carrier systems, and other intermediate transmission devices that have been employed by many Western Alliance members to provide quality voice services over the long loops required in remote areas. Hence, significant additional investment is necessary for Western Alliance members to upgrade their voice networks to bring broadband telecommunications services to their customers.

Western Alliance members are highly diverse. They did not develop along a common Bell System model, but rather employ a variety of network designs, equipment types and organizational structures. They must construct, operate and maintain their networks under climate and terrain conditions ranging from the deserts of Arizona to the rain forests of Hawaii to the tundra of Alaska, and from the valleys of Oregon to the plains of Kansas to the mountains of Wyoming. In many rural areas, the Western Alliance member not only is the carrier of last resort, but also is the sole telecommunications provider that has ever showed a sustained interest in serving the area.

**Rural Telephone Companies Have Rolled Out
Broadband Services At A Rapid Rate Under Title II Regulation**

Section 706(a) of the Communications Act ("the Act") requires the Commission and State commissions with jurisdiction over telecommunications services to encourage the deployment of advanced telecommunications capability to all Americans on a reasonable and timely basis by utilizing regulatory methods that remove barriers to infrastructure investment. Section 254(b)(2) of the Act states that access to advanced telecommunications and information services should be provided in all regions of the Nation. Section 254(b)(3) declares that consumers in all regions of the Nation (including low-income consumers and those in rural, insular and high-cost areas) should have access

to telecommunications and information services (including interexchange services and advanced telecommunications and information services) that are reasonably comparable to the services provided in urban areas, and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas. In response to these clear statutory mandates, the Commission has declared that its "primary policy goal [is] to encourage the ubiquitous availability of broadband to all Americans." NPRM at para. 3.

During recent years, Western Alliance members and other rural telephone companies have made substantial progress in bringing advanced telecommunications services to Americans residing in rural areas. As noted above, the percentage of NECA pool members offering DSL and other advanced telecommunications services rose from 14 percent in 1999 to more than 50 percent in 2001. NECA estimates that approximately 65 percent of rural telephone company lines will be capable of providing broadband service during 2002.³ This phenomenal progress in implementing rural broadband service was made under Title II rate-of-return regulation, a regime under which many of the small rural carriers investing in broadband facilities were able to recover a critical portion of their broadband investment and operating costs from the NECA pools.

Deployment of broadband facilities is very expensive for rural telephone companies. The unholy trinity of large geographical service territories, sparse populations, and rugged terrain requires investments of thousands of dollars per customer to upgrade lengthy rural customer loops for broadband capability. In addition, rural carriers must install and maintain DSL equipment, packet switches, and interoffice fiber optic facilities in order to provide quality broadband services.

³ National Exchange Carrier Association, NECA Rural Broadband Cost Study: Summary of Results (June 21, 2000).

NECA estimates that the costs of upgrading the loops of rural telephone company customers to broadband capability are:⁴

Description of loops to be upgraded to broadband capability	Cost
Loops of rural customers located within 18,000 feet of a rural telephone company central office or remote switch.	\$493
Loops of rural customers located more than 18,000 feet beyond central offices and remote switches, but within 18,000 feet of a digital loop carrier terminal.	\$4,121
Loops of rural customers located more than 18,000 feet beyond all central offices, remote switches and digital loop carrier terminals.	\$9,328

These NECA cost estimates pertain solely and entirely to loop upgrades, and are based on averaged characteristics. Individual company loop upgrade costs will vary due to differences in factors such as customer density, terrain, loop length, and the nature and condition of the intermediate transmission devices (if any) previously installed along their loops. Carriers also will need to recover the costs of their investments in DSLAMs and other DSL equipment, routers and packet switches, and interoffice transport facilities, as well as their broadband operating, maintenance and administrative costs.

A Western Alliance member that has deployed DSL in its rural service area estimates that, as of December 31, 2001, it had invested \$7,426 per broadband customer in upgraded loops and DSL equipment, and \$2,875 per broadband customer in interoffice facilities. Assuming a 25 percent carrying factor, this rural carrier would have to charge its broadband customers at least \$214.60 per month per line in a non-pooling, Title I

⁴ NECA Rural Broadband Cost Study, *supra* at 4.

environment just to recover its broadband investment costs. Recovery of its operating, maintenance and administrative expenses for broadband services would require an even higher monthly DSL service rate.

A second Western Alliance member that deployed DSL during 2001 incurred costs of \$8,846 per broadband customer for loop upgrades and DSL equipment alone. Assuming a 25 percent carrying factor, this rural carrier would have to charge its broadband customers at least \$184.29 per month per line in a non-pooling, Title I environment just to recover the costs of its upgraded loop and DSL equipment investment. Recovery of broadband transport costs, as well as of broadband operating, maintenance and administrative expenses, would increase the member's monthly DSL rate under Title I regulation to well over \$250-to-\$300 per customer.

A third Western Alliance member estimates that its average capital cost to upgrade its rural customer loops for DSL is between \$2,500 and \$3,000 per loop. Assuming a 25 percent carrying factor, this rural carrier would have to charge from \$52.08 to \$62.50 per month per broadband customer to recover its loop upgrade investment alone -- a rate which would increase to well over \$100-to-\$200 per month when recovery of DSL equipment investment, interoffice facilities, and broadband operating/maintenance/administrative costs is added.

Under the current Title II regulatory system, many rural carriers have been able to furnish DSL and other broadband services to their rural customers at affordable rates by participating in the NECA pools. By averaging the varying broadband investment and operating costs of hundreds of rural carriers and thousands of rural exchanges, NECA has been able to develop an affordable DSL rate of \$35.95 per month for rural telephone

company customers, with discounts for high-volume users and long-term commitments. The resulting customer demand and acceptance has enabled NECA pool members to invest in broadband facilities and roll out broadband services to their rural customers at a rapid rate since 1999.

Title I Regulation Threatens The Viability Of Rural Broadband Investment And Service

The NPRM tentatively concludes that wireline broadband Internet access services -- whether provided over a third party's facilities or self-provisioned facilities -- are information services subject to regulation under Title I and are not, in whole or part, telecommunications services regulated under Title II. Of particular concern is the request in paragraph 63 of the NPRM for comments regarding how the Part 64 cost allocation rules should be modified if wireline broadband Internet access service is classified as an information service. Paragraph 83 of the NPRM declares that classifying wireline broadband Internet access as an information service would mean that the Commission would have "to ensure that the costs of the network are properly allocated between regulated Title II services and Title I information services."

Western Alliance members and other rural telephone companies have invested in broadband facilities in order to provide broadband **telecommunications services** to their rural customers. They have made these investments at the behest of federal and state officials and agencies, and pursuant to understandings that a substantial portion of their broadband investment and operating costs would be recovered from the NECA pools under Title II rate-of-return regulation.

Paragraphs 63 and 83 of the NPRM raise questions whether the proposed Title I information services reclassification will force rural telephone companies to reallocate

substantial portions of their broadband investment and operating costs out of their Title II revenue requirements (most of which are presently recovered via the NECA pools). If these costs were required to be recovered solely or primarily from the monthly broadband service rates paid by rural customers, those rates would skyrocket to well over \$200 per month in many rural areas. Three-figure monthly rates would render broadband service unaffordable for most low-income and middle-income rural residents. The resulting contraction of the rural broadband customer base would bring to a screeching halt the recent progress made by rural telephone companies in bringing advanced telecommunications services to their rural customers, and would virtually eliminate incentives for future rural broadband investment.

**The Commission Should Not Classify Or Regulate
Rural Broadband Facilities And Services Under Title I**

Western Alliance members and other rural telephone companies have invested in broadband facilities and upgrades in order to offer data transmission services to the public for a fee. These data services are provided between or among points specified by the users, involve information of the users' own choosing, and entail no change in the form or content of the information as sent and received.

In other words, Western Alliance members and other rural telephone companies have invested in broadband facilities in order to provide **telecommunications services** to their rural customers. Whereas many Western Alliance members have established Internet Service Provider ("ISP") affiliates or divisions, neither the rural telephone companies nor their ISP affiliates/divisions engage significantly in the generation, acquisition, storage, transformation, processing, retrieval, utilization or making available of information via telecommunications. Rather, the DSL and other broadband facilities

of Western Alliance members constitute transparent transmission paths and conduits via which their rural customers can access and communicate with web sites located outside the telephone service area (as well as send and receive e-mail messages of their own choosing). The primary and predominant business of the Western Alliance members offering DSL service is to provide a transparent broadband transmission path, and not to change the form or content of the information passing through their broadband facilities. Hence, at least for rural telephone companies, DSL and other broadband services are solely and entirely Title II common carrier services.

The Western Alliance understands that the Regional Bell Operating Companies ("RBOCs") and other large carriers have sought Title I regulation for their broadband services in order to attain regulatory parity with competing cable modem services and broadband satellite services. The Western Alliance believes that such regulatory parity is a desirable goal, but believes that it can be better attained by exercise of the Commission's regulatory forbearance authority (particularly if incumbent local exchange carriers are determined to be non-dominant providers of broadband services in CC Docket No. 01-337). Regulatory forbearance is a flexible and effective tool for creating level competitive playing fields. In addition to its inherent advantages, it would avoid the legal and regulatory complexities of defining DSL and other broadband services as Title I services when provided by the RBOCs and other large carriers, and Title II services when provided by rural telephone companies.

If the Commission decides to reclassify wireline broadband Internet access services as a Title I service, the Western Alliance requests that it clarify that DSL and other broadband transmission services provided by rural telephone companies remain

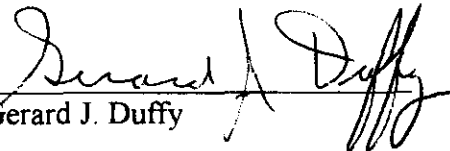
Title II telecommunications services as long as direct and ultimate access to the Internet is furnished by a separate ISP affiliate or division⁵ and/or by unrelated ISPs. This clarification would enable rural telephone companies to continue to invest in broadband facilities, and offer broadband services, subject to Title II regulation (including participation in the NECA pools), as long as direct access to the Internet is not furnished via bundled services provided by the rural carriers themselves.

Conclusion

The ubiquitous availability of broadband to all Americans requires that broadband services remain affordable in rural areas, and that rural telephone companies remain able to recover the substantial investments necessary to provide broadband capability. Rural telephone companies have made extraordinary progress in the implementation of broadband under Title II regulation and the NECA pooling process. Continued rural broadband investment requires that the broadband services of rural telephone companies be regulated as Title II telecommunications services, and that rural broadband rates be maintained at affordable levels (i.e., well below the \$100-to-\$200 per month or higher levels to which they could increase under a Title I regime).

Blooston, Mordkofsky, Jackson
Duffy & Prendergast
2120 L Street, NW (Suite 300)
Washington, DC 20554
Telephone: (202) 659-0830
Facsimile: (202) 828-5568
E-mail: gjd@bloostonlaw.com

Respectfully submitted,
THE WESTERN ALLIANCE

By 
Gerard J. Duffy

Its Attorney

Dated: May 3, 2002

⁵ The ISP ground rules could be similar to the Section 64.1903(a) requirements applicable to interexchange affiliates and divisions.

CERTIFICATE OF SERVICE

I, Douglas W. Everette, hereby certify that I am an attorney with the law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast, and that copies of the foregoing "Comments" were hand delivered on this 3rd day of May, 2002 to the persons listed below:

Marlene H. Dortch, Secretary
Federal Communications Commission
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street SW – Room 8-B201
Washington, DC 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street SW – Room 8-A204
Washington, DC 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street SW – Room 8-A302
Washington, DC 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street SW – Room 8-C302
Washington, DC 20554

Janice Myles
Policy & Program Planning Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W., 1-C807
Washington, D.C. 20554
(diskette)

Qualex International
445 12th Street, S.W., Room CY-B402
Washington, D.C. 20554
(diskette)


Douglas W. Everette